

## THE INTERNATIONAL CRIMINAL COURT: TIME TO ADJUST AMERICAN FOREIGN POLICY

BY

LIEUTENANT COLONEL SCOTT E. ZIPPRICH  
United States Army Reserve

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U.S. Army War College, Carlisle Barracks, PA 17013-5050

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**THE INTERNATIONAL CRIMINAL COURT:  
TIME TO ADJUST AMERICAN FOREIGN POLICY**

by

Lieutenant Colonel Scott E. Zipprich  
United States Army Reserve

Topic Approved By  
Colonel Allen Raymond

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U.S. Army War College  
CARLISLE BARRACKS, PENNSYLVANIA 17013

## **ABSTRACT**

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The majority of the world's nations have obligated themselves to the requirements of the Rome Statute, which created the International Criminal Court (ICC). The United States has refused to ratify the Rome Statute and has embarked on a series of efforts designed to undermine the ICC's operations. The United States avoids taking any significant action to resolve its concerns with the ICC, thereby eliminating any hope for eventual cooperation with the international community on this issue. This paper will examine the background of the ICC, and determine how the ICC has impacted recent military operations and foreign relations. This paper will then examine the implications associated with a decision by the United States to ratify the treaty versus not ratify the treaty. Finally, recommendations will be provided on how the United States should adjust its foreign policy to move it closer towards a more collaborative relationship with the ICC.

## THE INTERNATIONAL CRIMINAL COURT: TIME TO ADJUST AMERICAN FOREIGN POLICY

In the prospect of an international criminal court lies the promise of universal justice.

-- Kofi Annan, UN Secretary General<sup>1</sup>

The international community has focused an extraordinary amount of time and effort to establish the International Criminal Court (ICC) as part of its long term vision to establish an institution responsible for advancing international justice. For the first time, an International Court System has been established that has jurisdiction to try individuals accused of committing the most egregious crimes, including certain war crimes and human rights abuses. The United States has long been an advocate of bringing to justice those individuals who commit war crimes and has cooperated with the international community in achieving this shared interest. After the defeat of Nazi Germany, for example, the United States fully supported and led the international effort to prosecute war criminals at Nuremberg.

In the years prior to the establishment of the ICC, the United States clearly supported the idea of creating an International Court System. Congress had even passed legislation that expressed a need to establish an international criminal court.<sup>2</sup> In the developmental stages of the treaty creating the ICC, the Rome Statute, the United States sent a team to Rome to participate in the drafting of the legislation and resolve its concerns over many of the provisions. However, in the end, the United States did not become a signatory to the Rome Statute because many key provisions could not be agreed upon, including some that arguably failed to protect the rights of American

citizens under the U.S. Constitution. In the 2002 National Security Strategy (NSS), U.S. policy regarding the ICC became clear. The NSS specifically provided the following:

We will take the actions necessary to ensure that our efforts to meet our global security commitments and protect Americans are not impaired by the potential for investigations, inquiry, or prosecution by the International Criminal Court (ICC), whose jurisdiction does not extend to Americans and which we do not accept.<sup>3</sup>

The 2002 NSS went even further to address specific actions the United States would take to protect itself from the ICC by stating the following:

We will implement fully the American Service Members Protection Act, whose provisions are intended to ensure and enhance the protection of personnel and senior officials from the United States.<sup>4</sup>

Since the publication of the 2002 NSS, the United States has taken considerable steps to curtail the jurisdictional reach of the ICC, including the withholding of funds from other countries that signed the Rome Statute. U.S. reputation as a persuasive world community leader will likely continue to suffer from such actions and this will likely have a detrimental impact on national interests if it does not change its foreign policy. The United States risks being replaced by a more credible world leader that better demonstrates its commitment to advancing international justice and the interests of the international community.

Arguably, the United States has relaxed its position toward the ICC since the publication of the 2006 NSS. Instead of continuing a hostile approach towards the ICC, the 2006 NSS is silent on the ICC issue. Instead of emphasizing force and pre-emption, the NSS emphasizes diplomacy and cooperation with the international community.<sup>5</sup> Moreover, there is a notable emphasis on preventing international atrocities and taking action against those who commit such atrocities.<sup>6</sup> Despite the seemingly relaxed U.S.

position, the current administration has not yet articulated its policy toward the ICC. In the meantime, the United States remains outside of the ICC and risks further isolation by the international community.

This paper will examine the background of the ICC and the development of U.S. policy regarding the ICC, and determine how the ICC has impacted recent military operations and foreign relations. This paper will then examine the implications associated with a decision by the United States to ratify the treaty versus not ratify the treaty. Finally, this paper will provide recommendations on how the United States should adjust its policy to move it closer towards a more collaborative relationship with the ICC.

#### A Brief History of the International Criminal Court

The concept of international crimes has been in existence for centuries.<sup>7</sup> The list of international crimes continues to grow as nations recognize that certain crimes must be afforded the status of international crimes in which any nation could assert criminal jurisdiction.<sup>8</sup> Prior to the development of the ICC, individual countries had sole responsibility to try individuals from their own nation for the commission of an international crime.<sup>9</sup> The trial and the outcome would be governed by the laws of the country where the perpetrator was brought to trial. Naturally, there were strong perceptions of unfairness and partiality when international crimes were resolved in the perpetrator's homeland, particularly when the perpetrator was found innocent or received an unusually light sentence despite overwhelming evidence.<sup>10</sup> In the aftermath of World War I, the international community made its first attempt at forming an international court to try hundreds of suspected war criminals.<sup>11</sup> However, this initial



effort had little success because only twelve of the 896 suspects were ever tried, resulting in six acquittals and very light sentences for three of the remaining six.<sup>12</sup>

The aftermath of the two World Wars helped promote additional efforts to establish international crimes and an international criminal tribunal. In 1948, the United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide, essentially establishing the international crime of genocide. The Convention dictated that genocide must be tried by the State in which the act was committed or by an “international penal tribunal as may have jurisdiction.”<sup>13</sup> Additionally, the international community revised the Geneva Conventions and established that individuals could be held criminally responsible for committing certain international crimes.<sup>14</sup> However, the revisions focused on regulating conduct during international armed conflicts, not internal armed conflicts or civil war.<sup>15</sup> An additional push to create an international tribunal arose when Trinidad and Tobago requested the United Nations study the idea of creating a tribunal to deal with drug traffickers.<sup>16</sup> In 1992, the General Assembly granted a mandate to the International Law Commission to prepare a draft statute for an international criminal court.<sup>17</sup>

The conflict in Yugoslavia provided further justification for the international community to develop an international court. The United Nations established the International Criminal Tribunal for Yugoslavia (ICTY) in 1993, granting it the power to try individuals alleged to have committed war crimes.<sup>18</sup> Despite strong arguments to the contrary, the ICTY established that customary international law allows the court to pierce state sovereignty and try individuals for violations of international crimes.<sup>19</sup>

In 1994, with support from the United States, the International Law Commission completed its work on the Rome Statute to create an international criminal court.<sup>20</sup> After a series of committee sessions to further develop the draft statute, an international diplomatic conference was held in Rome, Italy, from 15 June to 17 July 1998.<sup>21</sup> The United States participated by sending a negotiating team to address its concerns; however, many significant issues were not resolved prior to the end of the conference.<sup>22</sup> Nevertheless, President William J. Clinton signed the treaty on 31 December 2000 to demonstrate U.S. continuing support for the concept of international justice and, among other things, maintain a position of influencing future negotiations over the Rome Statute.<sup>23</sup> However, because U.S. concerns were not resolved, President Clinton expressly indicated the treaty would not be submitted to the Senate for ratification.<sup>24</sup> In 2002, President George W. Bush stated the treaty would not be ratified and the United States had no obligation to abide by the terms of the Rome Statute.<sup>25</sup> In the end, the Rome Statute was passed by the requisite number of votes and became effective on 1 July 2002.<sup>26</sup> Despite the United States' position, the list of countries signing the treaty continues to grow with three additional countries signing within the past year.<sup>27</sup>

#### U.S. Response to the International Criminal Court

The United States quickly took action to limit the ICC's influence over U.S. citizens, despite the acceptance of the treaty by a majority of the world's nations. One month after the Rome Statute became effective, President Bush signed into law the American Servicemembers' Protection Act (ASPA), which contains a number of provisions prohibiting the United States from cooperating with the ICC and authorizes the President to use military force by "all means necessary and appropriate" to obtain the

release of any person detained or imprisoned by, or at the request of, the ICC.<sup>28</sup> The only significant exception to the ASPA is the Dodd Amendment, which allows the United States to participate and assist the ICC to try foreign nationals accused of war crimes, genocide, and crimes against humanity.<sup>29</sup>

On 1 July 2003, the Bush Administration invoked one of the provisions of the ASPA and terminated military assistance to any government of a country that had joined the ICC and who had not signed a Bilateral Immunity Agreement (BIA), otherwise known as an Article 98 agreement.<sup>30</sup> The signing of the BIA results in both countries promising not to arrest, detain, prosecute or imprison any of their citizens for the ICC unless both parties agree in advance to the surrender.<sup>31</sup> The termination of military assistance for those countries refusing to sign the BIA affected the receipt of both International Military Education and Training (IMET) and Foreign Military Financing (FMF).<sup>32</sup> The restrictions have resulted in millions of dollars in aid cuts and loss of numerous cooperative training opportunities.<sup>33</sup> Because one-half of the States affected by the cuts were in Latin America, the impact to the region was significant.<sup>34</sup> Eleven of the twelve States in Latin America that participated in IMET in 2003 could not participate in 2004.<sup>35</sup> The cuts have hampered engagement opportunities and the ability of the U.S. military to maintain professional contacts with partner countries.<sup>36</sup> FMF cutbacks totaled 4.4 million in 2005 and 3 million in 2006, resulting in the inability of several Latin American countries to pursue military modernization projects.<sup>37</sup> Additional detrimental impacts have likely occurred in addition to those illustrated above, including the alienation of foreign military leaders and an inability of the United States to influence military or political activities in these countries.

The Bush Administration took an additional step to persuade countries to sign the BIAs by limiting civilian economic aid to States that refused to sign a BIA. On 7 December 2004, President Bush signed into law an amendment, known as the Nethercutt Amendment, to the Foreign Appropriations Bill.<sup>38</sup> The Nethercutt Amendment prevents Economic Support Funds (ESF) from being provided to countries that have not signed a BIA with the United States.<sup>39</sup> The ESF were designed to, among other things, promote economic and political stability in regions of particular interest to the United States and support initiatives in the areas of basic social services, peacekeeping, antiterrorism, democracy building, HIV/AIDS education, drug interdiction, etc.<sup>40</sup>

#### A Change in American Policy?

The U.S. reaction to the ICC has had a significant impact on the international community and military operations abroad. Nations throughout the world voiced their outrage and disgust over the Bush Administration's actions, perceiving them as intentionally designed to interfere with ICC operations.<sup>41</sup> There have been 101 countries that have signed a BIA, but fifty-three have refused.<sup>42</sup> The European Union has even warned its members not to sign a BIA, claiming the agreement is inconsistent with international law and a misuse of Article 98 of the Rome Statute.<sup>43</sup>

In 2006, senior military commanders and Congressional representatives urged the Bush Administration to change its policy towards use of BIAs. Not only did the denial of foreign assistance prevent nations from receiving critical funding, but it had an unforeseen impact on international relations.<sup>44</sup> The reactions by both the international community and the U.S. military convinced the Bush Administration to change its tactics

and reverse course on some previous decisions. On 17 October 2006, President Bush ended the ban on IMET assistance to all countries who were party to the treaty.<sup>45</sup> On 22 November 2006, President Bush waived restrictions on ESF under the Nethercutt amendment for 14 countries.<sup>46</sup> In January 2008, the United States eliminated restrictions on FMF to States refusing to sign BIAs and confirmed that it no longer was pursuing other States to sign the BIAs. Retreating from its hostility towards the ICC, the United States accepted the decision of the UN Security Council to refer the Darfur situation to the ICC, and openly recognized the value that the ICC brings in investigating and prosecuting the individuals responsible for the atrocities in the region.<sup>47</sup> Shortly after the swearing in of Barack H. Obama as President, the U.S. Permanent Representative to the United Nations praised the ICC as “an important and credible instrument” as part of its effort to address the situation in Darfur.<sup>48</sup> Secretary of State Hillary Clinton recently declared that the United States will end its hostility towards the ICC.<sup>49</sup> Most recently, on March 11, 2009, President Obama signed into law the 2009 omnibus appropriation bill, which excluded the Nethercutt provision.<sup>50</sup> These recent events, coupled with the 2006 NSS, appear to indicate the United States has softened its uncooperative and openly hostile policy towards the ICC. However, more definitive action is needed to demonstrate a significant change in American Foreign Policy has occurred.

#### Impact of the ICC on Recent Military Operations Abroad

The ICC has had an impact on U.S. military operations. With the Rome Statute now in force, U.S. military service members are now at risk of being prosecuted for participating in operations abroad. The United States is now forced to consider the

impact of the ICC prior to deciding whether to engage in military operations. Ideally, the United States would prefer maintaining exclusive jurisdiction over the misconduct of all deployed U.S. citizens; however, there is often a strong need to respect the sovereignty of an occupied nation. The following brief examination of recent military operations demonstrates the great efforts the United States will take to ensure its personnel are provided the highest levels of protection.

*Bosnia.* On 30 June 2002, the day prior to the Rome Statute going into force, the United States used its veto power in the Security Council to block the renewal of the United Nations peacekeeping operations in Bosnia because its peacekeepers were not given immunity.<sup>51</sup> The international community's efforts were delayed by U.S. actions until, on 12 July 2002, the UN Security Council adopted Resolution 1422. This Resolution essentially deferred ICC investigations and prosecutions of non-State Parties to the Rome Statute, including the United States, who were engaged in peacekeeping operations.<sup>52</sup>

*Darfur.* On 18 September 2004, Security Council Resolution 1564 passed, which created a UN Commission of Inquiry with the mandate of determining, in part, whether acts of genocide had occurred in Darfur.<sup>53</sup> The Commission strongly recommended that the situation in Darfur be referred to the ICC.<sup>54</sup> Despite initial U.S. support of Resolution 1564, the Bush Administration opposed the Commission's recommendation and, instead, proposed the establishment of an ad hoc tribunal to be administered by the UN and the African Union.<sup>55</sup> The UN Security Council passed Resolution 1593 and the matter was referred to the ICC Prosecutor against U.S. wishes.<sup>56</sup> The Resolution also required the Government of Sudan and all other parties to the conflict in Darfur to

cooperate fully with and provide any necessary assistance to the ICC.<sup>57</sup> The United States abstained from voting for the passage of UN Resolution 1593, reiterating its position that the ICC should not be able to exercise jurisdiction over non-party nationals.<sup>58</sup> The United States negotiated and eventually was successful in exempting nationals of non-party States in Sudan from prosecution, opening the door to future U.S. military operations.<sup>59</sup>

*Iraq.* Up until 31 December 2008, the United States had exclusive jurisdiction over all its deployed personnel in Iraq.<sup>60</sup> On 1 January 2009, the U.S. – Iraq Security Agreement went into effect. As part of the Security Agreement, Iraq gained jurisdiction over the misconduct of U.S. servicemembers and its civilian component. However, after the United States intensely negotiated with Iraqi officials, it was agreed that Iraq would gain jurisdiction only if such misconduct was committed off-duty, outside “agreed facilities,” and qualified as “grave premeditated felonies.”<sup>61</sup> The Security Agreement also greatly diminished the ability of the ICC to assert jurisdiction over the conduct of U.S. personnel in Iraq. The Rome Statute specifically prohibits the ICC from requesting assistance or surrender of personnel if it requires a State to act inconsistently with its obligations under an international agreement, unless the sending State consents.<sup>62</sup> Even if Iraq were to obtain jurisdiction over a U.S. citizen as part of the Security Agreement, the ICC could request surrender of the person only if it first obtained U.S. cooperation. In sum, the risk to U.S. personnel remains extremely low and the U.S. mission remains unchanged. The only significant impact of the Security Agreement is U.S. leaders are now stressed to conduct operations in cooperation with Iraqi Security forces.<sup>63</sup>

*Afghanistan.* In Afghanistan, the United States is participating in two military operations, Operation Enduring Freedom (OEF), a U.S.-led coalition, and the International Security Assistance Force (ISAF), a NATO-led coalition.<sup>64</sup> In 2002, the United States reached an agreement that accorded U.S. military and civilian personnel of the U.S. Department of Defense immunity equivalent to that provided to administrative and technical staff of the U.S. Embassy.<sup>65</sup> U.S. military and civilian personnel would receive immunity from criminal prosecution by Afghan authorities and immunity from civil and administrative jurisdiction, except for acts performed outside the course of their duties.<sup>66</sup> A similar agreement was also reached for the ISAF and its supporting personnel.<sup>67</sup>

The United States shares the goal of promoting international criminal justice and acknowledges that, in some instances, the ICC may have a role to play.<sup>68</sup> However, the United States places significant importance on establishing and maintaining almost complete immunity for its military and civilian personnel abroad, and will seem to engage in military operations only when the risk of being investigated or prosecuted by the ICC is extremely minimized. Although obtaining such a high level of protection was considered warranted by the Bush Administration, such actions only breed perceptions of exceptionalism. This perception is further compounded by the United States' refusal to sign or ratify other significant international law treaties that impact military operations throughout the world, such as the treaty to ban antipersonnel landmines. Admittedly, the U.S. has more troops deployed abroad in military operations than any other country and, therefore, has a heightened interest in protecting its citizens. However, the United States has not always been the primary contributor of personnel in all military



operations in which it sought immunity for its deployed personnel. In Bosnia, for example, the U.S. personnel contribution amounted to less than one percent of the total UN force.<sup>69</sup> In sum, the United States' actions to protect its own personnel in military operations continue to undermine its ability to claim the high moral ground and influence other countries on humanitarian assistance matters.

#### Not Ratifying the Treaty - The Implications

The Rome Statute provides that the ICC may exercise criminal jurisdiction over nationals of States not party to the Rome Statute.<sup>70</sup> The U.S. Government and many scholars persuasively argue that the ability of the ICC to exert jurisdiction over non-party States violates the fundamental principles of international law, thereby infringing upon a nation's sovereignty.<sup>71</sup> Regardless of U.S. arguments to the contrary, the ICC has already exercised Article 12 of the Rome Statute and exerted jurisdiction over non-parties. The ICC's on-going effort to investigate and prosecute senior governmental officials in Sudan illustrates this point. It appears, therefore, that not ratifying the treaty offers no more protection from the ICC. Yet, remaining a non-party State at least affords the United States with a perceived justification, rooted in its own interpretation of international law, to resist ICC efforts to assert jurisdiction over U.S. citizens.

By not ratifying the Treaty, U.S. citizens avoid the numerous pitfalls associated with the ICC's rules and procedures. For example, opponents of the ICC argue that the ICC Prosecutor has unnecessarily broad powers to act and make a variety of decisions without sufficient checks and balances.<sup>72</sup> Specifically, the ICC Prosecutor has the authority to initiate investigations or prosecutions without a referral by the UN Security

Council or by a State Party.<sup>73</sup> The effect of such broad powers could, arguably, allow the prosecutor to make decisions that are motivated by political reasons.<sup>74</sup>

The Rome Statute's complementarity principle permits other nations, even non-party States, to exert jurisdiction over their own nationals who may have been arrested abroad. The complementarity principle arguably insulates U.S. citizens from being investigated or prosecuted by the ICC so long as the United States is willing and able to "genuinely" carry out the investigation or prosecution.<sup>75</sup> However, the definition of "genuinely" remains open to interpretation.<sup>76</sup> As such, the ICC may still obtain jurisdiction over a U.S. citizen if it determines the investigation or prosecution was conducted to shield the individual from prosecution by the ICC or if it was conducted in a manner "inconsistent with an intent to bring the person concerned to justice."<sup>77</sup>

Avoiding the ratification of the treaty also prevents the prosecution of U.S. citizens for crimes that are either too broad or too narrow.<sup>78</sup> The crimes, as currently written are arguably not well drafted and could result in absurd outcomes.<sup>79</sup> Also, the ICC arguably does not offer U.S. citizens the same due process guarantees they have in the U.S. court system, such as the right to appeal a case outside the ICC.<sup>80</sup>

Since many NGOs have anti-American agendas, the United States would avoid having to contend with NGOs who attempt to influence the ICC Prosecutor to initiate investigations against the United States. As a State Party, the United States would be subject to all the obligations and responsibilities as provided in the Rome Statute, including the obligation to fully cooperate with the ICC Prosecutor. The ICC may exercise its jurisdiction over an alleged crime if a situation is referred to the ICC Prosecutor by a State Party or the Security Council. However, the ICC Prosecutor may

initiate an investigation based on information received from any source so long as the Prosecutor concludes there is a reasonable basis to proceed with an investigation.<sup>81</sup> To date, the ICC Prosecutor has already received a much higher number of complaints from NGOs when compared to the number of complaints from other sources.<sup>82</sup> These NGOs, arguably, have less incentive to show restraint in raising cases to the ICC Prosecutor compared to other nations.<sup>83</sup>

The United States demands that its servicemembers and senior U.S. Government officials be protected from the ICC when they are deployed worldwide to protect the nation's vital national interests.<sup>84</sup> The United States fears the international community will use the ICC to question the legitimate strategic and tactical decisions that may have resulted in non-combatant deaths.<sup>85</sup> By not ratifying the treaty, the United States is forced to work out solutions to ensure immunity for its deployed personnel on a case by case basis. However, by doing so, the United States will continually demonstrate its willingness to work against the international community's efforts to collaboratively support the ICC.

#### Ratifying the Treaty - The Implications

The most relevant implication of signing the treaty is that all U.S. citizens, including service members, would be automatically subject to all the requirements and obligations associated with the treaty, increasing the risk that U.S. citizens would be tried by the broad reach of the ICC's jurisdiction.<sup>86</sup> Nevertheless, there are many organizations and scholars who persuasively argue that the United States should ratify the treaty. Despite arguments to the contrary, proponents of the ICC view the complementarity principle as sufficiently strong to protect the interests of U.S. citizens abroad.<sup>87</sup> For the ICC to assert

its jurisdiction over another State's objections, the alleged crime committed must first be one of the few crimes enumerated in the Rome Statute, which include genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>88</sup> Second, the ICC must decide if the State genuinely failed to investigate or prosecute a legitimate violation of international law committed by one of its citizens. The likelihood that a U.S. citizen would commit an international crime and the U.S. Government fail to genuinely investigate and, if supported by the evidence, prosecute such a case is extremely remote.<sup>89</sup> The strong desire of the U.S. civilian populace to bring individuals who commit an international crime to justice is the primary reason why the complementarity principle is sufficiently strong. There is no absolute protection against U.S. citizens from ever being prosecuted by the ICC. Given the persistent anti-American attitude many countries maintain and the number of personnel deployed throughout the world, the United States is arguably placing itself at great risk by ratifying the treaty. The relatively ambiguous terms contained in the Rome Statute compound the risk. However, over the years the ICC has clearly established a favorable track record, showing no obvious signs of pursuing a political agenda against the United States.<sup>90</sup> Moreover, the ICC has not pursued an investigation or prosecution against any U.S. personnel for their involvement in past U.S. military operations. In Iraq, predictions of such abuses have not materialized despite the over 240 communications to the ICC by citizens and organizations alleging various crimes.<sup>91</sup> Although the ICC Prosecutor seemingly has broad powers, creating an opportunity for a politicized prosecution, the Rome Statute contains many procedural safeguards to prevent an abuse of powers and frivolous prosecutions.<sup>92</sup> The complementarity principle, coupled with the jurisdictional and other

procedural safeguards, were intended to place a check on the power of the Prosecutor and the ICC, thereby protecting the sovereignty of all nations.<sup>93</sup> Many scholars and organizations, such as the American Bar Association, even claim the ICC provides sufficient due process protections, equivalent to those afforded by the U.S. Constitution.<sup>94</sup>

As a party to the Rome Statute, the United States would no longer serve in a non-voting observer role with limited privileges. The United States would be better able to effect changes to the Rome Statute, ICC procedures, and other matters as a voting member at the upcoming Review Conference of the Rome Statute scheduled for 2010.<sup>95</sup> The United States would also be able to bring additional funding and manpower to ensure the continued functioning of the ICC.

The United States has longed enjoyed a reputation for leading other nations in the struggle for human rights. However, its reputation is in jeopardy if it continues to ignore the treaty. Individuals, NGOs and other nations have continually expressed their displeasure with the United States' refusal to ratify the Rome Statute.<sup>96</sup> Ratification of the treaty would send a clear signal to the international community of the U.S. commitment in the struggle for human rights. The United States would be better able to influence the development of the law of war and gain international support for future operations, instead of being perceived as a country that supports a unilateral approach to international concerns. Ratification would also likely motivate other remaining nations to become party to the treaty. The United States will continue to lose its credibility the longer it continues to isolate itself from the ICC.

Finally, the United States would appease a large number of NGOs who have voiced their concerns over the United States' refusal to ratify the Rome Statute. The United States views NGOs as complementary to the activities of the U.S. Government and understands that NGOs are becoming more influential and powerful in international affairs.<sup>97</sup> The dilemma created by the U.S. Administration not adhering to the demands of numerous large and powerful NGOs would be less of a concern.

### Recommendations for Adjusting the Current Strategy

There are a considerable number of suggestions on how the United States should interact with the ICC as discussed above. Given the ICC's favorable track record over the years, and increased international legitimacy, the United States must abandon its hostile, evasive policy towards the ICC and adopt a more cooperative and engaging policy. As discussed below, the Obama Administration should immediately implement the following three courses of action:

(1) Participate as an observer in the 2010 Review Conference of the Rome Statute. As a non-party observer, the United States has no vote in review conferences but remains eligible to participate in both the Assembly and in Review Conferences.<sup>98</sup> The Review Conference will give nations the opportunity to consider amendments to the Statute and any other matter, such as establishing a definition to the yet undefined crime of aggression. The United States has the opportunity to express its viewpoints, become involved in discussions, influence other party members and demonstrate our resolve to pursue the struggle for human rights. Ignoring the Review Conference through non-participation does little, if anything, to further our interests.

(2) Proactively engage with the ICC. As a non-party to the treaty, the United States is not obligated to provide assistance or cooperate with any prosecutions or investigations conducted by the ICC.<sup>99</sup> The United States is also not obligated to provide information or documents, or contributions to the ICC budget.<sup>100</sup> However, there are no provisions in the Rome Statute that prevent the United States from providing assistance on its own initiative. The United States could, for example, volunteer information, contribute money to the ICC, or offer investigative or criminal subject matter experts to assist with complex or sensitive investigations. Given its significant resources, the United States has the capability to have a profoundly positive impact on ICC operations. For example, monetary contributions could greatly assist the ICC with its current financial problems.<sup>101</sup> Such actions could help the United States reestablish its reputation as a leader in promoting universal world justice and facilitate its on-going efforts to make changes to the Rome Statute.

(3) Demonstrate its support of the ICC to the international community. Other countries are likely influenced or feel justified in avoiding the ICC if the United States acts in a similar manner. The Obama Administration could set the tide of change in motion by ensuring the new NSS clearly documents a change in U.S. policy. A proposed policy statement in the NSS might state the following:

We will take the actions necessary to promote universal justice, the rule of law and human rights to meet our global security commitments. We approve of the efforts of the International Criminal Court, and will cooperate and provide assistance to the tribunal to the fullest extent possible while ensuring our interests in protecting Americans abroad is not impaired. We will explore ways to resolve our differences with the ICC and the international community to provide a unified effort in preventing international atrocities and ensuring those who commit such atrocities are brought to justice.

U.S. Government officials must also step up their continued showing of support through speeches and interviews, at home and abroad. Senior U.S. Government officials must stop making statements that only seem to confuse and upset the international community. To illustrate, on 25 April 2008, Mr. Bellinger, then Legal Advisor to the Secretary of State, explained that the starting point for cooperation is recognition of each other's position.<sup>102</sup> Mr. Bellinger and other U.S. officials continually urged other nations who were party to the treaty to respect a U.S. decision to not join. However, at the same time, the United States continued to subject countries to foreign assistance cuts for refusing to sign BIAs.<sup>103</sup> The perception created is the United States fails to respect the decisions of other nations while demanding respect for its own.

As suggested by others, the United States must completely review existing agreements and laws, including the ASPA and BIAs, to determine the impact on national security efforts, the effectiveness in dissuading other countries to not join the ICC, and the financial impact on other countries.<sup>104</sup> As part of this review, efforts must be made to strengthen the complementarity principle by examining existing laws and passing new laws to ensure there are no gaps such that the ICC could assert its criminal jurisdiction because of a perceived inability of the United States to prosecute an international crime.<sup>105</sup> Given the time needed to examine all necessary laws, the United States should nevertheless immediately move forward to ratify the treaty. However, as part of the ratification process, the United States must negotiate some protections to ensure it is given a genuine opportunity to address its domestic concerns. The United States may, for example, negotiate for the right to opt out of the treaty at any time. The United States could also negotiate for immunity from ICC prosecutions for a period of



time along with the ability to extend the period of immunity until it is satisfied the network of laws are firmly set in place.

### Conclusion

U.S. interests in the ICC will remain high since no other country has nearly as many troops deployed or engaged in stability type operations. The United States should not sign the treaty as written today. However, through a planned series of efforts to engage more with the ICC and change its legal landscape at home, the United States will facilitate its own and the world's interests in promoting a more effective international criminal justice system. The recent limited vocal support for the ICC from senior government officials is a step in the right direction, but only through action can the United States demonstrate genuine support for the ICC and earn respect from the international community. The ICC appears to be a viable international organization for years to come and; therefore, the United States must not revert back to a hostile, non-cooperative policy towards the ICC. Doing so would promote perceptions of exceptionalism, provide justification for other countries to avoid the ICC, and fail to facilitate the establishment of international standards for international crimes. The United States is at crossroads in deciding how to support the ICC. The small steps it makes towards positive engagement will most likely have significant long-lasting positive impacts on American interests abroad.

### Endnotes

<sup>1</sup> "Establishment of an International Criminal Court – Overview," <http://untreaty.un.org/cod/icc/general/overview.htm> (accessed December 5, 2008).

<sup>2</sup> John B. Bellinger, "The United States and the International Criminal Court: Where We've Been and Where We're Going," Remarks to the DePaul University College of Law, April 25, 2008, <http://www.state.gov/s/l/rls/104053.htm> (accessed May 16, 2008).

<sup>3</sup> George W. Bush. *The National Security Strategy of the United States of America* (Washington, D.C.: The White House, September 2002), 31.

<sup>4</sup> Ibid.

<sup>5</sup> The Brookings Institution, "Statement on the 2006 National Security Strategy," [www.brookings.edu/opinions/2006/0316diplomacy\\_daalder.aspx?p=1](http://www.brookings.edu/opinions/2006/0316diplomacy_daalder.aspx?p=1) (accessed January 28, 2009).

<sup>6</sup> George W. Bush. *The National Security Strategy of the United States of America* (Washington, D.C.: The White House, March 2006), 17. The 2006 National Security Strategy provides:

We must not allow the legal debate over the technical definition of "genocide" to excuse inaction. The world must act in cases of mass atrocities and mass killing that will eventually lead to genocide even if the local parties are not prepared for peace.

<sup>7</sup> Bruce D. Landrum, *The Globalization of Justice: the Rome Statute of the International Criminal Court* The Judge Advocate General School, Department of the Army (1 September 2002), 2.

<sup>8</sup> Ibid.

<sup>9</sup> Geoffrey S. Corn, *New Options for Prosecuting War Criminals in Internal Armed Conflicts Parameters* (Spring 2002): 1.

<sup>10</sup> Ibid.

<sup>11</sup> Treaty of Versailles, 28 June 1919, <http://www.firstworldwar.com/source/versailles.htm> (accessed May 5, 2009).

<sup>12</sup> Landrum, 3.

<sup>13</sup> The International Criminal Court, "Chronology of the International Criminal Court," [www.icc-cpi.int/about/ataglance/chronology.html](http://www.icc-cpi.int/about/ataglance/chronology.html) (accessed May 19, 2008).

<sup>14</sup> Corn, 4.

<sup>15</sup> Ibid.

<sup>16</sup> Landrum, 4.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid. Dusan Tadic, the first person tried by the ICTY, argued that the ICTY had no jurisdiction over his conduct because his actions were the exclusive responsibility of domestic law and not an international criminal tribunal. The ICTY rejected Tadic's argument and concluded that the obligations found in treaties regulating state-on-state conflicts had become applicable to internal armed conflicts.

<sup>20</sup> Congressional Research Service,, *U.S. Policy Regarding the International Criminal Court: Report for Congress* (Washington, D.C.: U.S. Congressional Research Service, August 29, 2006), 6.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> A letter from John R. Bolton, U.S. Under Secretary of State for Arms Control and International Security, to Kofi Annan, U.S. Secretary General (May 6, 2002), <http://www.2001-2009.state.gov/r/pa/prs/2002/9968.htm> (accessed May 5, 2009). This letter stated the following:

This is to inform you, in connection with the Rome Statute of the International Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in the letter, be reflected in the depositary's status lists relating to this treaty.

<sup>26</sup> The American Society of International Law, *U.S. Policy Toward the International Criminal Court: furthering Positive Engagement* (Washington D.C.: The American Society of International Law 2009), 3. The final vote was 120 in favor to seven against with 21 countries abstaining. The United States was joined by Iran, Iraq, China, Israel, Libya, and Sudan in voting against the Statute.

<sup>27</sup> *The International Criminal Court Home Page*, <http://www.icc-cpi.int/asp/states+parties.html> (accessed May 5, 2009, noting that 108 countries are signatories to the Rome Statute with Madagascar, Cook Islands and Surinam signing in the past year).

<sup>28</sup> Congressional Research Service, *U.S. Policy Regarding the International Criminal Court*, 2; American Service-Members' Protection Act of 2002, P.L. 107-206, 16 Stat. 899 (2002) (codified at 22 U.S.C. §§ 7421 *et seq.*) [hereinafter ASPA]. The ASPA prohibits cooperation with the ICC and provides specific restrictions, including the prohibition against assisting with the extradition of citizens and permanent aliens; using federal funds for the purpose of assisting in the investigation, arrest, detention, extradition or prosecution of any U.S. citizen or permanent alien; directly or indirectly transferring classified national security and law enforcement information to the ICC; and restricting U.S. participation in peacekeeping missions unless the President certifies that there will not be a risk of U.S. troops being prosecuted by the ICC or that national interests justify acceptance of the risk.

<sup>29</sup> Congressional Record, S7859, August 1, 2002. Section 2015 provides the following:

Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosevic, Osama bin Laden, other members of Al Qaeda, leader of Islamic Jihad, and other foreign national accused of genocide, war crimes or crimes against humanity.

<sup>30</sup> Congressional Research Service, *Article 98 Agreements and Sanctions on U.S. Foreign Aid to Latin America: Report for Congress* (Washington, D.C.: U.S. Congressional Research Service, March 22, 2007), 6. The Bilateral Immunity Agreement correlates to Article 98(2) of the Rome Statute which states:

The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender. The Rome Statute, 2002, accessible at [http://untreaty.un.org/cod/icc/statute/english/rome\\_statute\(e\).pdf](http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf), accessed May 5, 2009.

<sup>31</sup> Ibid., 3.

<sup>32</sup> Ibid., 6. The International Military Education and Training program provides training via grants to students from allied and other friendly nations. The Foreign Military Financing program provides grants to nations to purchase U.S. defense services, training and equipment. Ibid., 7.

<sup>33</sup> Ibid., 8.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid., 7.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid., 10.

<sup>38</sup> The American Society of International Law, *U.S. Policy Toward the International Criminal Court: furthering Positive Engagement*, 11.

<sup>39</sup> Ibid.

<sup>40</sup> United States Agency for International Development, "Economic Support Fund," <http://www.usaid.gov/policy/budget/cbj2009/101425.pdf> (accessed May 5, 2009).

<sup>41</sup> One of the most vocal responses came from the countries in Latin America, who opposed U.S. efforts to persuade them to sign the BIA. To illustrate, in June 2005, then-president Alfredo Palacios stated that Washington may defend its policies regarding the ICC but "not at the expense of Ecuador's sovereignty." Congressional Research Service, *Article 98 Agreements and Sanctions on U.S. Foreign Aid to Latin America*, 4. After the United States threatened to delay peacekeeping operations in Yugoslavia by using its veto power, the UN Assistant Secretary-General stated:

The U.S. is fully entitled not to want to join the ICC and indeed oppose it. The problem here is not US opposition to the ICC, but the fact that UN peacekeeping has been hijacked as a tool to express America's opposition to the ICC. Victoria K. Holt

and Elisabeth W. Dallas, *On Trial: The Military and the International Criminal Court*, (The Henry L. Stimson Center, no. 55, March 2006): 58.

<sup>42</sup> Coalition for the International Criminal Court, "Status of the United States Bilateral Immunity Agreements (BIAs)," Fact Sheet, <http://www.iccnw.org> (accessed on May 5, 2009).

<sup>43</sup> Lilian V. Faulhaber, "American Servicemembers' Protection Act of 2002," *Harvard Journal of Legislation* 40, no. 2 (Summer 2003): 555.

<sup>44</sup> Victoria K. Holt and Elisabeth W. Dallas, 58.

<sup>45</sup> Congressional Research Service, *Article 98 Agreements and Sanctions on U.S. Foreign Aid to Latin America*, 7.

<sup>46</sup> The America Non-Governmental Organizations Coalition for the International Criminal Court, "Domestic Law Provisions," [http://www.iccnw.org/usinfo/congress\\_texts.html](http://www.iccnw.org/usinfo/congress_texts.html) (accessed May 5, 2009).

<sup>47</sup> Congressional Research Service, *Article 98 Agreements and Sanctions on U.S. Foreign Aid to Latin America*, 2.

<sup>48</sup> The Washington Post, "Editorial: Beware of International Justice," May 6, 2009, <http://www.washingtontimes.com/news/2009/feb/06/beware-of-international-justice/>, (accessed May 5, 2009).

<sup>49</sup> Walter Pincus, "Clinton's Goals Detailed," January 19, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009011802268.html> (accessed May 5, 2009).

<sup>50</sup> 2009 Omnibus Appropriations Bill, Public Law No. 111-8 (March 11, 2009); Ana Gomez Rojo and Lucia DiCicco, "At the ICC, Ex-Child Soldiers Testify and Bashir Eludes Arrest," <http://www.unausa.org/page.aspx?pid=1216> (accessed May 5, 2009).

<sup>51</sup> Victoria K. Holt and Elisabeth W. Dallas, 58.

<sup>52</sup> Congressional Research Service, *U.S. Policy Regarding the International Criminal Court*, 23. The United States obtained a renewal in 2003, but the request to renew the exemption was not approved in 2004 when after pictures emerged of U.S. troops abusing and torturing prisoners in Abu Ghraib.

<sup>53</sup> United Nations Security Council, Resolution 1564 (September 18, 2004). The Resolution states:

*Requests* that the Secretary – General rapidly establish an international commission of inquiry in order to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred and to identify the perpetrators of such violations.

<sup>54</sup> Darfur Peace and Accountability Act of 2006, 109<sup>th</sup> Congress, 2d Session, January 3, 2006, <http://www.govtrack.us/congress/billtext.xpd?bill=h109-3127> (accessed May 5, 2009). The Report of the International Commission of Inquiry on Darfur established that:

The Government of the Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law, amounting to crimes under international law.

<sup>55</sup> Brett D. Schaefer, "Why the United States is Right to Support an Ad Hoc Tribunal for Darfur," February 15, 2005, <http://www.heritage.org/research/internationalorganizations/wm665.cfm> (accessed May 5, 2009).

<sup>56</sup> Press Release SC/8351, "Security Council Refers Situation in Darfur Sudan to Prosecutor," March 31, 2005, <http://www.un.org/news/press/docs/2005/sc8351.doc.htm> (accessed April 5, 2009).

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid. The specific language that afforded U.S. personnel immunity in Darfur is provided below:

*Decides* that nationals, current or former officials or personnel from a contributing State outside which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omission arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless exclusive jurisdiction has been expressly waived by that contributing state.

<sup>60</sup> Congressional Research Service, *Statement of Jennifer Elsea before the Subcommittee on International Organizations, Human Rights, and Oversight of the House Foreign Affairs Committee, Report of Congress* (Washington D.C., U.S. Congressional Research Service, February 28, 2008), 5,6. None of the Security Council Resolutions provide for the immunity of coalition troops from Iraqi legal process. However Coalition Provisional Authority Order 17 established that all personnel of the multinational force, which includes U.S. personnel, were immune from the Iraqi legal process. The U.N. Security Council expired on 31 December 2008.

<sup>61</sup> "Agreement Between the United States of American and the Republic of Iraq," January 1, 2009, <http://georgewbush-whitehouse.archives.gov/news/releases/2008/11/20081127-2.html> (accessed May 5, 2009).

<sup>62</sup> The Rome Statute, 2002, Article 98, [http://untreaty.un.org/cod/icc/statute/english/rome\\_statute\(e\).pdf](http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf). (accessed May 5, 2009).

<sup>63</sup> "Agreement Between the United States of American and the Republic of Iraq," January 1, 2009. The definition of "grave premeditated felonies" and "agreed facilities" is still not defined and, consequently, there remains plenty of room for either side to argue whether a particular incident meets the terms of the agreement.

<sup>64</sup> Congressional Research Service, *Statement of Jennifer Elsea before the Subcommittee on International Organizations, Human Rights, and Oversight of the House Foreign Affairs Committee*, 2.

<sup>65</sup> *Ibid.*, 6.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*, 2. Pursuant to the Military Technical Agreement negotiated by the ISAF and the Afghan Interim Authority, ISAF and supporting personnel are subject to the exclusive jurisdiction of their respective nations and are immune from arrest and detention by Afghan authorities. The agreement prevents the turning over of such personnel to any international tribunal, such as the ICC, or any other entity or State without the consent of the contributing nation.

<sup>68</sup> The American Society of International Law, iii.

<sup>69</sup> Victoria K. Holt and Elisabeth W. Dallas, 58.

<sup>70</sup> The Rome Statute, 2002, Article 12.

<sup>71</sup> Congressional Research Service, *U.S. Policy Regarding the International Criminal Court*, 5; Title 22, United States Code, Section 7421.

<sup>72</sup> Michael Smidt, "The International Criminal Court: An Effective Means of Deterrence," *Military Law Review*, vol. 167: 197.

<sup>73</sup> Congressional Research Service, *U.S. Policy Regarding the International Criminal Court*, 8.

<sup>74</sup> *Ibid.*, 7.

<sup>75</sup> Smidt, 216.

<sup>76</sup> *Ibid.*

<sup>77</sup> The Rome Statute, 2002, Article 17.1.

<sup>78</sup> Smidt, 213.

<sup>79</sup> *Ibid.* To illustrate a possible absurd outcome, when Pol Pot slaughtered 2 million Cambodians, this slaughter, to some, is not genocide because it was based on politically-divided groups and not based on reasons due to nationality, ethnicity, race or religion as genocide is defined by the Rome Statute. Consequently, the ICC would not be able to assert jurisdiction.

<sup>80</sup> Congressional Research Service, *International Criminal Court: Overview and Selected Legal Issues: Report for Congress* (Washington, D.C.: U.S. Congressional Research Service, June 5, 2002), 29 and 38.

<sup>81</sup> The Rome Statute, Article 15.

<sup>82</sup> "Update on Communications Received by the Office of the Prosecutor of the International Criminal Court," [http://www.org/documents/otp\\_update\\_on\\_communications\\_10-February\\_2006.pdf](http://www.org/documents/otp_update_on_communications_10-February_2006.pdf) (accessed May 5, 2009). Since 2002, the ICC has received 1732 communications from individuals and groups, but has only received 3 referrals from State Parties and 1 referral from the UN Security Council.

<sup>83</sup> Ibid.

<sup>84</sup> Title 22, United States Code, section 7421.

<sup>85</sup> Victoria K. Holt and Elisabeth W. Dallas, 37.

<sup>86</sup> The Rome Statute, Article 12(1); William K. Lietzau, "International Criminal Law After Rome: Concerns from a U.S. Military Perspective," *Law and Contemporary Problems* 64, no. 1 (2001): 128.

<sup>87</sup> Faulhaber, 553.

<sup>88</sup> The Rome Statute, Article 5, provides that the ICC can not assert jurisdiction over the crime of aggression until a definition has been adopted by the Party States.

<sup>89</sup> Lietzau, 128.

<sup>90</sup> The American Society of International Law, 20.

<sup>91</sup> Brian A. Hoyt, "Rethinking The U.S. Policy on the International Criminal Court," *Joint Forces Quarterly*, no. 48 (1<sup>st</sup> Quarter, 2008): 33.

<sup>92</sup> Congressional Research Service, *U.S. Policy Regarding the International Criminal Court*, 8.

<sup>93</sup> The American Society of International Law, 37.

<sup>94</sup> Congressional Research Service, *International Criminal Court: Overview and Selected Legal Issues*, 29.

<sup>95</sup> Ibid., 41.

<sup>96</sup> Ibid., 22.

<sup>97</sup> U.S. Department of State, *Non-Governmental Organizations* (Washington, DC; U.S. Department of State, 1996), <http://www.state.gov/r/adcompd/1996rep.html> (accessed December 29, 2008).

<sup>98</sup> Congressional Research Service, *U.S. Policy Regarding the International Criminal Court*, 19.

<sup>99</sup> The Rome Statute, 2002, Articles 59 and 89.



<sup>100</sup> Ibid., at Articles 73 and 115.

<sup>101</sup> Due to a shortfall in funding for 2009, ICC has been forced to take €7,405,983 from the special Working Capital Fund, which was created to provide financial assistance when the ICC experiences liquidity problems. International Criminal Court Resolution ICC-ASP/7/Res.4, available from [http://www.icc-cpi.int/iccdocs/asp\\_docs/resolutions/ICC-ASP-ASP7-Res-04-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/resolutions/ICC-ASP-ASP7-Res-04-ENG.pdf) (accessed May 8, 2009).

<sup>102</sup> Bellinger; Marc Grossman, "American foreign Policy and the International Criminal Court," Policy Paper, May 6, 2002.

<sup>103</sup> Ibid.

<sup>104</sup> David J. Scheffer, "A Negotiator's Perspective on the International Criminal Court," *Military Law Review* (March 2001): 15.

<sup>105</sup> Ibid.; The American Society of International Law, 40.